



OFFICE OF THE POLICE COMMISSIONER

ONE POLICE PLAZA • ROOM 1400

September 20, 2023

Memorandum for: Deputy Commissioner, Trials

Re: **Sergeant Hugh Barry**
Tax Registry No. 946768
Patrol Borough Manhattan North
Disciplinary Case No. 2017-17490

The above named member of the service appeared before Deputy Commissioner, Trials Rosemarie Maldonado on January 18, 26, 27, and 31, and February 1, 3, and 4, 2022 and was charged with the following:

DISCIPLINARY CASE NO. 2017-17490

1. Said Sergeant Hugh Barry, while assigned as the 43rd Precinct Patrol Supervisor, on or about October 18, 2016, at about 1806 hours, inside [REDACTED] Avenue, Bronx County, exercised poor tactical judgment leading to the discharge of his firearm, and did discharge his firearm towards Deborah Danner, resulting in the death of Deborah Danner.

P.G. 221-01, Pages 1-3

**FORCE GUIDELINES –
TACTICAL OPERATIONS**

P.G. 221-02, Pages 1-2

**USE OF FORCE – TACTICAL
OPERATIONS**

P.G. 221-13, Pages 1-3

**MENTALLY ILL OR
EMOTIONALLY DISTURBED
PERSONS – TACTICAL
OPERATIONS**

2. Said Sergeant Hugh Barry, while assigned as the 43rd Precinct Patrol Supervisor, on or about October 18, 2016, at about 1806 hours, inside [REDACTED] Avenue, Bronx County, wrongfully failed to perform his duties as Patrol Supervisor and to supervise properly subordinate Members of the Service present at the scene of an incident reportedly involving an emotionally disturbed person.

P.G. 207-17, Pages 1-2

**DUTIES AND
RESPONSIBILITIES
PATROL SUPERVISOR**

In a Memorandum dated April 13, 2023, Deputy Commissioner, Trials Rosemarie Maldonado found Sergeant Hugh Barry guilty of Specification No. 1 and not guilty of Specification No. 2 in Disciplinary Case No. 2017-17490. Having read the Memorandum and analyzed the facts of this matter, I approve of the findings, but disapprove the penalty.

I have considered the totality of the circumstances and issues concerning the misconduct for which Sergeant Barry has been found guilty, and agree that separation from the Department is warranted. However, instead of an outright dismissal from the Department, I will permit an alternative manner of separation from the Department for Sergeant Barry at this time.

It is therefore directed that an *immediate* post-trial settlement agreement be implemented with Sergeant Barry in which he shall forfeit thirty (30) suspension days (already served), forfeit thirty (30) suspension days (to be served), be placed on one (1) year dismissal probation, forfeit all time and leave balances, and immediately file for vested-interest retirement.

Such vested interest retirement shall also include Sergeant Barry's written agreement to not initiate administrative applications or judicial proceedings against the New York City Police Department to seek reinstatement or return to the Department. If Sergeant Barry does not agree to the terms of this vested interest retirement agreement as noted, this Office is to be notified without delay. This agreement is to be implemented **IMMEDIATELY**.



Edward A. Caban
Police Commissioner



POLICE DEPARTMENT

April 13, 2022

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In the Matter of the Charges and Specifications : Case No.
against : 2017 17490
Sergeant Hugh Barry :
Tax Registry No. 946768 :
Patrol Borough Manhattan North :
-----X-----

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Rosemarie Maldonado
Deputy Commissioner Trials

APPEARANCES:

For the Department: David Green & Gulgora Tali, Esqs.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Andrew Quinn & John D'Alessandro, Esqs.
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To:

HONORABLE KEECHANT L. SEWELL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

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P.G. 202-17, Pages 1-2

DUTIES AND RESPONSIBILITIES
PATROL SUPERVISOR

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on January 18, 26, 27 and 31, and February 1, 3 and 4, 2022. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Jennifer Danner, Victor Berrios, Jayquan Brown, Firefighter Patrick Moore, Principal PCT Shareema Jones, Police Officers Javier Perez, Jabbour Rabadi, John Martin, Michael Garces and Camilo Rosario, Detective Robert Downes, Lieutenants Robert Tillwitz and David Ng, and Captain Gregory Stewart, as witnesses. Respondent called Retired Chief Joanne Jaffe and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's

review. Having reviewed all of the evidence in this matter, the tribunal finds Respondent Guilty of Specification 1 and Not Guilty of Specification 2, and recommends that he be DISMISSED from the New York City Police Department.

INTRODUCTION

Procedural History

On October 18, 2016, at 1805 hours, a 911 dispatcher received a call seeking assistance for Deborah Danner, a sixty-six year old woman with a history of schizophrenia who lived at [REDACTED] [REDACTED] Avenue in the Bronx. Within ten minutes, two RMPs from the 43 Precinct responded to the location, immediately followed by EMS. Respondent, the Patrol Supervisor for the 43 Precinct, arrived at 1822 hours. Six minutes later, there was a transmission of shots fired at the location. Ms. Danner suffered gunshot wounds to the chest after Respondent fired two rounds. She was pronounced dead at Jacobi Hospital later that day. (Tr. 322-34, 600, Dept. Ex. 19)

Set forth below is the procedural history of civil, criminal and administrative disciplinary matters stemming from this police shooting.

- On May 30, 2017, a Bronx County grand jury returned a true bill and indicted Respondent for second-degree murder, first and second-degree manslaughter and criminally negligent homicide. The Department suspended Respondent following his arrest.
- On July 3, 2017, the Department Advocate served Respondent with Departmental Charges and Specifications.
- On February 15, 2018, Bronx County Supreme Court Judge Robert Neary found that the record had failed to establish, beyond a reasonable doubt, that the shooting was not justified and returned a verdict finding Respondent not guilty of all criminal charges.
- On February 23, 2018, the Department lifted Respondent's suspension and placed him on modified assignment.
- On February 24, 2018, the Department's Force Investigation Division issued a report which concluded that Ms. Danner's shooting was "justified and within Department

guidelines.” The Board also recommended that Charges and Specifications be issued due to what appeared to be several violations of Department policy.

- On April 17, 2018, the Department Advocate served Respondent with Amended Charges and Specifications which dismissed the specifications mirroring Penal Law crimes. The remaining specifications focusing on tactics and supervision are detailed above.¹
- In December 2018, Deborah Danner’s sister, Jennifer, was paid two million dollars to settle the wrongful death lawsuit she filed against the City and the NYPD in connection with this shooting. (Tr. 96-97)
- Respondent’s Departmental disciplinary trial commenced on January 18, 2022 and concluded on February 4, 2022 more than five years after the shooting and nearly four years after Respondent’s acquittal.

Scope of Disciplinary Trial

At this disciplinary hearing, the Department Advocate and Respondent’s counsel entered into the following stipulation:

[T]hat the New York City Police Department Force Investigation Division completed an investigation into the shooting of Deborah Danner on October 18, 2016 by Sergeant Hugh Barry at 630 Puglsey Avenue, Bronx, New York. Subsequently, the Department’s Force Review Board considered that investigation’s findings, and made conclusions stating, in part, that Sergeant Barry’s firearm discharge which killed Deborah Danner on October 18, 2016 was “within Department guidelines.” That conclusion was approved by the Police Commissioner on April 13, 2018.

At trial, the parties further agreed that the “actual shooting itself is not an issue in this case.” (Tr. 30, 744) Accordingly, it is not within the purview of this proceeding to determine whether Respondent’s use of his firearm was reasonable, consistent with his training or in compliance with the standards set forth in the Patrol Guide. The narrow issues to be determined here are whether Respondent exercised poor tactical judgment and whether he properly supervised his subordinates at the scene.

¹ The Department amended the Charges and Specifications on February 24, 2021, for the sole purpose of removing the reference to P.G. 221-14 (Hostage/Barricaded Persons) from the caption. The Department amended these Charges and Specifications for a final time on September 30, 2021, to remove the dismissed Penal Law specifications and renumber the remaining tactical and failure to supervise specifications.

BACKGROUND

Deborah Danner's Psychiatric History

Jennifer Danner is Deborah Danner's younger sister. At trial, she provided this tribunal with information concerning Deborah's background and psychiatric history. Jennifer testified that she and Deborah had a close relationship when they were growing up. That changed when Deborah was in her 20s and began to "disappear for days at a time." (Tr. 50-54) Their mother sought appropriate medical interventions and Deborah was eventually diagnosed with paranoid schizophrenia. According to Jennifer, her sister's behavior became increasingly erratic in later years. As a result, the police were repeatedly called to her apartment to either address her disruptive behavior or respond to Deborah's recurrent "burglary" complaints. Despite these difficulties, Deborah never threatened to physically harm herself or others. (Tr. 55-58, 61, 98-99, 115)

The sisters resided in separate apartments within the Jamie Towers complex. Their mother was also a Jamie Towers resident until her death in 2006. Testimony at trial established that Jennifer attempted to care for her sister. The staff at Jamie Towers partnered with her in doing so, including property manager Victor Berrios and building security lieutenant Jayquan Brown. For example, Mr. Berrios worked with Jennifer to prevent Deborah from being evicted when she owed eight thousand dollars in maintenance arrears. Jennifer paid her sister's debt by taking out a loan from her retirement account to ensure that Deborah had a place to live. On other occasions, Mr. Brown and Mr. Berrios kept "an eye out" for Deborah, particularly when she disappeared and failed to return Jennifer's calls. They also reached out to Jennifer when her sister appeared to be having difficulties. Mr. Berrios even took on the task of feeding Deborah's cat during one of her hospitalizations. (Tr. 57-61, 64-67, 98-99, 131, 145-51, 210-11)

The frequency of Deborah’s “schizophrenic episodes” intensified in 2015 and 2016. Jennifer specifically recalled two incidents where the police took down her apartment door after Deborah was “screaming and hollering” in the building hallway. On one of these occasions, patrol officers were able to “grab” Deborah and transport her to the hospital in a straitjacket. On a second occasion, ESU used a “long pole” to push Deborah “back against the wall so [officers could] go in and get her.” (Tr. 62-64, 100-02) According to Jennifer, HIPAA limited her ability to speak to her sister’s doctors to ensure that Deborah received adequate medical treatment. To better protect her sister, she hired a lawyer and sought legal guardianship over Deborah’s person and property. The guardianship was granted in August 2016. (Tr. 67-71)

Mr. Berrios and Mr. Brown provided testimony about their own interactions with Deborah Danner. Mr. Berrios recalled “numerous” incidents that the NYPD or FDNY responded to in connection with Deborah, including an estimated three occasions when her door was taken down. He did not remember Deborah ever threatening to harm herself, or physically harm others. Although she often told him, “I’m going to get you,” he interpreted that to mean she was going to get him “fired.” (Tr. 142-52, 164, 167-69, 171-72, 235)

Mr. Brown recounted that at times Deborah was cordial and at times she was rude and cursed at him. She never, however, made physical threats nor did he ever observe her being physically violent. He testified that resident noise complaints were the primary issue that arose from Deborah’s outbursts. (Tr. 188-93, 205, 235-37, 240)

Initial Reports of Ms. Danner’s October 18, 2016 Disturbance

During the early evening of October 18, 2016, Mr. Berrios received a phone call from a resident notifying him that Ms. Danner was “acting up in the hallway [and] being very loud.” He called security guard Jayquan Brown and asked him to go to the 7th floor and tell Ms. Danner “to go back inside her apartment.” (Tr. 159) According to Mr. Brown, Mr. Berrios also asked him to

call the NYPD if Ms. Danner was “causing disruption.” Mr. Brown proceeded to Ms. Danner’s apartment with a second security guard and Victor Lugo, a building maintenance worker. Mr. Brown heard screaming before the elevator doors even opened on the 7th floor. Once there, he observed Ms. Danner wearing a nightgown in the hallway as she yelled profanities. He also saw paper on the floor of the common area. (Tr. 188-94, 197-98, 238-253)

Mr. Brown believed that Ms. Danner was “going back inside of her unit,” but called 911 to report “that [he] had an EDP” and needed police assistance. Specifically, he told the operator that Ms. Danner was “slamming on doors here, she’s banging things, she’s ripping up things.” When asked if Ms. Danner had a weapon, he responded, “I don’t know. She’s inside the house. She might have...hold on.” (Dept. Ex. 2, 2A at 2-3) At some point, Mr. Lugo took over the phone because Mr. Brown became “very overwhelmed.” Mr. Lugo informed the operator that Ms. Danner was a paranoid schizophrenic who had previously been “removed from the apartment because she barricades herself inside.” (Tr. 194-203, 241-59; Dept. Ex. 2A at 3-4) After a moment, Mr. Brown resumed speaking to the 911 operator. When asked if Ms. Danner was violent, he responded, she “can be.” When the 911 operator asked if she was barricaded, Mr. Brown replied that she was not, but confirmed that she had a history of doing so. Mr. Brown and Mr. Lugo then proceeded downstairs to the lobby hoping that Ms. Danner “would deescalate ... in time for the NYPD.” (Tr. 203-207, 259-62, 265-67, 290, 297; Dept. Ex. 2A at 5-7) Mr. Lugo phoned Mr. Berrios to inform him that Ms. Danner was “amped up” and the NYPD had been notified. (Tr. 160)

From the downstairs lobby, Mr. Brown called Jennifer Danner, who said she would be right over. Because she assumed the police would transport her sister to the hospital, Ms. Danner made sure to bring the documents establishing her legal guardianship. Her hope was that

these documents would enable her to coordinate with her sister's doctors to ensure that she receive the necessary level of medical care. (Tr. 71-75, 210-11)

911 Dispatch and ESU Assignment

Principal Police Communications Technician Shareema Jones reviewed the 911 event chronology of this case. She explained that on October 18, 2016, a 911 call reporting a violent emotionally disturbed person ("EDP") at [REDACTED] Avenue came in at 1805 hours. (Tr. 317-24; Dept. Ex. 4A) The notes referenced the subject as "cursing" and with a history of schizophrenia. The 911 chronology is as follows:

- 1807 hours: ESU assigned
- 1808 hours: 43 Precinct, Sector Boy, assigned
- 1814 hours: 43 Precinct, Sector Boy, arrived at the scene
- 1815 hours: 43 Precinct Response Auto and EMS arrived at the scene
- 1822 hours: Respondent, the 43 Precinct sergeant, arrived at the scene
- 1828 hours: Report of shots fired and gun shots to EDP

Principal Jones explained that when 911 operators receive an EDP call, they determine: whether the person is violent; whether weapons are involved; and, whether the subject has a history of past episodes. In 2016, a 911 Zone Dispatcher would forward EDP calls to the Special Operations Dispatcher who would then assign the job to an Emergency Services Unit ("ESU"). The decision to have ESU actually respond to the scene, however, is a field decision. (Tr. 301-310, 325-28, 332-33, 339-41)

Detective Robert Downes, confirmed that the ESU "Adam Car" in the Bronx is assigned all EDP calls within their catchment area. During his October 18, 2016 tour, the ESU "Adam Car" was assigned a total of 23 EDP calls. He opined that given the volume, it is impossible for ESU to respond to the scene of every alleged EDP incident. (Tr. 962) Instead, ESU officers monitor the jobs over the radio for key words such as "accessibility," "barricade" and "weapons." If specifically requested to a scene by patrol, ESU will respond, barring an

unforeseen emergency.² (Tr. 933, 940-46) It is not disputed that in this case ESU monitored the EDP job involving Ms. Danner, but did not respond to the scene until after the shots fired radio transmission. (Tr. 948-51)

Initial Response to 911 Call

At 1808 hours, Police Officers Camilo Rosario and Javier Perez were assigned to the violent EDP call at [REDACTED] Avenue. They pulled up to the apartment complex at 1814 hours. A backup RMP, staffed by Police Officers Jabbour Rabadi and Michael Garces, arrived a minute later and were immediately followed by EMTs, Patrick Moore and Brittany Mullings. Mr. Brown waved them over and let them into the building. Rosario and Perez spoke to Mr. Brown and ascertained that a resident was “erratically making noise, breaking stuff” in the 7th floor hallway. Rosario recalled that the security guard described the EDP as “violent.” The security guard escorted the officers to the 7th floor, but he waited at the end of the hallway as the officers proceeded to apartment 7E. (Tr. 212, 345-56, 432, 485-92 861-66, 904, 1146-55)

When they exited the elevator, Perez noticed “a lot of papers on the floor,” but they did not hear anything as they walked to apartment 7E. Rosario knocked on the door as Perez stood behind him. Eventually, a female “angr[ily]” yelled, “What do you want?” Rosario informed her that they were police officers and asked that she open the door. After some coaxing, Ms. Danner complied. Both Rosario and Perez characterized her voice as “aggressive” and “loud.” Rosario tried to calmly explain that someone had called because she was “breaking stuff” and they were there “to help” and “make sure she was okay.” Two of the officers present recalled Ms. Danner repeatedly screaming that they should “get the fuck away” because she had not “fucking called” them and did not need the police. Ms. Danner tried, but was unable to close the

² Captain Gregory Stewart, an ESU patrol captain, confirmed that if precinct personnel requests ESU, “we go to request” and that “we generally don’t respond to [EDP calls] unless specifically requested by patrol personnel.” On cross-examination, he agreed that if ESU were called to even ten percent of EDP jobs, it would divert resources from their other tasks, such as rescue jobs. (Tr. 975-87)

door because Rosario had placed his foot in the threshold. When she stepped back into the apartment, Rosario and the other three officers entered. (Tr. 358, 362-67, 433-38, 492-97, 538, 867-75, 1155-65, 1227-35) The vestibule was small and the presence of multiple boxes made it, and the narrow apartment hallway, “a lot tighter” and difficult to maneuver. All the officers present recalled that Ms. Danner continued screaming for them to leave. (Tr. 368-81, 436-40, 495-97, 884, 1169-71; Dept. Exs. 9, 12, 13; Resp. Exs. A3-5, A8) Mr. Brown confirmed that, from his position down the hallway, he heard Ms. Danner slamming things and yelling, “I didn’t call you. I don’t need you. Leave me alone.” (Tr. 215) The EMTs remained waiting in the hallway as the officers entered. (Tr. 87, 221, 393-96, 501-02, 832, 877, 1242-47)

Initial Police De-escalation Efforts

Rosario testified that once inside the apartment he took the lead and began speaking to Ms. Danner from a distance of five or six feet. When asked to describe their conversation, he recounted, “I tried to explain to her a call [was] made that [she was] breaking stuff in the apartment and [making] a lot of noise... [S]ince [the police were] call[ed], we have to talk to you and EMS [has] got to talk to you too.” (Tr. 1163-67) She continued to “yell” that she wanted them out as Rosario calmly explained, “We can’t leave now. You have to talk to EMS... a few questions and then we leave. We’re trying to make sure you’re alright.” (Tr. 1169-70) He estimated this exchange went on for a few minutes during which time Ms. Danner paced “back and forth” in and out of her bedroom as she cursed and insisted that they leave. (Tr. 1170-71, 1179, 1240-41)

Rosario testified that Ms. Danner eventually grabbed a pair of scissors from the bedroom and held it in her hands with the metal blade pointing sideways. She continued pacing with the scissors in her hand before sitting on the bed. Once she was in the bedroom, Rosario moved a few feet from the end of the hallway to the hallway pillar, where he had a partial view of Ms.

Danner as she sat in her bedroom, scissors in hand. Rosario testified that the scissors represented a “small danger” and he had to keep his “distance … just in case” the armed subject charged toward him. (Tr. 1171-81, 1256-58) He continued his verbal efforts to calm Ms. Danner, imploring her to put down the scissors and talk to him and the EMTs. The officer told her, “a few questions and maybe you don’t have to go to the hospital. If you do, you’re going to come right back.” (Tr. 1182)

Though the scissors elevated Rosario’s safety concerns, he did not call ESU because Ms. Danner had neither threatened nor advanced toward them with the scissors; she was isolated and contained in the bedroom which allowed them to maintain a zone of safety in the hallway. Instead, he “concentrated” on the de-escalation techniques he had learned during training and had successfully employed “hundreds” of times before. (Tr. 1258-60) He also noted that police officers do not usually move to restrain an EDP prior to the arrival of a sergeant. (Tr. 1302) The other three officers present at this time confirmed at trial that Rosario attempted to gain Ms. Danner’s voluntary compliance through verbal persuasion. (Tr. 386, 443, 457, 504, 544, 548, 880-81)

Perez testified that Ms. Danner’s voice became “more elevated…more aggressive” after the officers entered the apartment. He observed Rosario attempt to gain compliance, but he moved toward the bedroom to speak to Ms. Danner himself because Rosario’s efforts had not been successful. He noted that as Rosario spoke to her, Ms. Danner “got louder” and “looked agitated to the point we didn’t want to get close.” When he looked into the bedroom, he observed Ms. Danner sitting on the left side of the bed with a pair of scissors in her hands, still yelling. He testified that her hands were cupped over the handle of the scissor and the blade was pointed sideways. Perez told her, “We’re here to help, we are going to get you help” and tried to persuade her to put down the scissors. His efforts to achieve voluntary compliance also failed.

Instead, Ms. Danner continued cursing and repeated, “If you come closer, I’m going to fight you.” In response, Perez backed away from the bedroom door. He no longer had a view of Ms. Danner but was able to watch the bedroom door in the event she attempted to exit. He did not consider calling ESU because they were “trying to take our time to see if she would comply,” which in his experience had worked with other armed EDPs. (Tr. 381-91, 441-52)

Rabadi similarly recounted that the longer they were in the apartment, the angrier Ms. Danner became. When she was advised that the officers were not leaving, she threatened to “fight all of us.” After hearing Rosario state that she had scissors, he shifted his position to observe Ms. Danner sitting on her bed, hunched over, with the scissors in hand. He did not feel ESU was necessary at this point, because Rosario, consistent with their training, was still attempting to verbally de-escalate the situation. (Tr. 502-05, 544-48)

Garces testified that Ms. Danner demanded that they “get the fuck out.” He concurred that Rosario was “calm” and “straightforward” as he attempted to gain voluntary compliance. Garces testified that he saw Ms. Danner in her bedroom holding scissors in her hand, though he did not “recall the exact time frame” of that observation. The officer added that his “eyes” were “fixed on the bedroom” and that he did it for his “own safety, and my partner, and everyone else on the scene....” (Tr. 869-879, 882, 885-886)

EMS Response

EMTs Patrick Moore and Brittany Mullings responded to the 911 call at 1815 hours and proceeded to the 7th floor. The level of interaction the EMTs had with Ms. Danner, and where they were positioned throughout, is in dispute. What is not controverted is that, once on the 7th floor: they heard Ms. Danner screaming; they were made aware that Ms. Danner “wanted nothing to do with the police” but was willing to speak to them; and, Ms. Danner was in her bedroom holding scissors. (Tr. 602-03, 609, 674; Dept. Ex. 21 at 278, 282) The testimony

further established that Fire Department policy states that EMTs should “ensure that a scene is safe before … enter[ing]” to provide aid. (Tr. 592, 677; Dept. Ex. 21 at 281-82, 309-10) It is further uncontested that the EMTs did not render medical aid to Ms. Danner until after Respondent shot her.

Arrival of Jennifer Danner and Respondent

Respondent and his driver, Police Officer John Martin, drove up to Jamie Towers approximately eight minutes after the arrival of the first two RMPs. Jennifer Danner had also arrived by that time and rode the elevator to the 7th floor with Respondent and Martin. It is uncontested that in the elevator she asked that they not “take down this door” and explained that she “already had to pay for two of them.” She did not recollect either officer responding. Respondent, however, recalled telling her, “There was no clean way to take a door down. We’ll obviously do the best we can.” Respondent and Martin did not ask her any questions and Jennifer did not offer any additional information. She admitted that, at that moment, she was “only concerned about them damaging the door.” (Tr. 74-83, 93-96, 117-21, 765-68, 815-16, 1331-33, 1383-84; Dept. Ex. 5)

When the elevator doors opened, Jennifer immediately heard her sister screaming, “Why are you here? Leave me alone. I don’t want you here.” She also observed two EMTs and four other police officers surrounding the door of apartment 7E. Mr. Brown grabbed her arm and they stood together near the elevator while Respondent and Officer Martin proceeded to apartment 7E. (Tr. 86-88, 122) As Jennifer stood with Mr. Brown, Mr. Brown testified that he heard Deborah “getting escalated…more annoyed with the presence of the EMTs and police officers.” (Tr. 224-26)

ANALYSIS

Specification 1: Tactics

Summary of Testimony Concerning Tactical Decisions

The proceeding course of events leading up to shots being fired are largely in dispute but essential to the determination of the charges. The pivotal question of fact is what occurred during the five and a half minutes between Respondent pulling up to [REDACTED] Avenue in an RMP and making the shots fired radio transmission. Given the passage of years since 2016, and the stressful impact of an unexpected EDP police shooting, it is not surprising that the nine fact witnesses who testified at this trial were not entirely consistent about salient details concerning those critical minutes. It is, nonetheless, the fundamental task of the trier of fact to reconstruct the probable sequence of past events, even when presented with varying and sometimes vague testimony.

After carefully considering all witness accounts in this case, as well as the totality of the evidence presented at trial, this tribunal finds that the record established, by the preponderance of the credible evidence, that Respondent abandoned a zone of safety and moved in to unnecessarily restrain an uncooperative and violent EDP who was armed, or had a weapon within easy reach, when she was isolated and contained in her bedroom.

At trial, Respondent recounted the following version of events. He told this tribunal that Jennifer Danner's comment about two door removals signaled that ESU had previously responded to barricaded situations at 7E. (Tr. 1332-34, 1381-82) As he approached that apartment, Respondent observed that its door was open. This led him to presume that the EDP was not barricaded. He also deduced, however, that the EDP might be noncompliant and that scene safety had not been established because two EMTs were standing in the hallway instead of rendering aid inside. Respondent admitted that he did not speak to the EMTs and made no

attempt to identify the 911 caller. He explained that the first step a sergeant must take when responding to an EDP call is to assess the situation and speak to the officers already on the scene. He “just wanted to go inside. They were outside and I have to speak to my officers inside...Those are my cops...It was a potential violent EDP and I wanted to see what was going on.” (Tr. 1329-30, 1334-36, 1369, 1385-86, 1389)

Upon entering Ms. Danner’s apartment, Respondent saw four officers standing by a pillar near the bedroom hallway. He also observed a stack of boxes by that pillar. According to Respondent, Perez told him that there was a woman in the bedroom with a pair of scissors who refused to come out. Respondent looked into the bedroom, saw Ms. Danner sitting on her bed and ascertained that she was isolated and contained inside. He described the area outside the bedroom as the officers’ “zone of safety.” (Tr. 1337-42, 1392, 1402-03) Because the officers had not gained voluntary compliance, Respondent attempted to engage Ms. Danner himself. His goal was to have her leave the apartment voluntarily to be examined by the EMTs. (Tr. 1343-44, 1354, 1379-80, 1393-94)

Respondent positioned himself by the pillar, angled behind the boxes, to give them “some separation.” He estimated that he stood about ten feet away from Ms. Danner. From that position he observed Ms. Danner seated on the bed with scissors in hand “cutting pieces of paper kind of viciously” in a “downward motion.” Her demeanor appeared “agitated.” Respondent told her, “Ma’am we’re only here to help you. Please put the scissors down and come outside.” According to Respondent, Ms. Danner looked at him, clenched the scissors in her right fist, pointed them up in the air, and retorted, “I’m not fucking coming out of the room.”³ He reiterated, “We’re only here to help you. The EMTs are here. They just want to speak to you.” Ms. Danner told him that the EMTs could come in, but not the police. Respondent explained,

³ Respondent testified before the grand jury that Ms. Danner told him, “Don’t fucking come in here.” (Tr. 1399)

“Unfortunately, the EMTs, they can’t come in here. You have the scissors. They’re nervous. They’re scared. That’s why I really need you to put down the scissors and come out.” He then tried to “bargain” with Ms. Danner and “gain her trust” by offering to “take a few steps back” if she would put down the scissors and come outside. According to Respondent, he suggested that she walk towards the door with him. Respondent claimed that Ms. Danner then “took the scissors and slammed them on the nightstand on the corner...by the pillow. She got up and came just right outside the doorway of her bedroom.” A photograph of the scissors on the nightstand was admitted into evidence as Department’s Exhibit 14. Respondent estimated that by that time, he had been in the apartment “three or four minutes.” (Tr. 1345-50, 1353, 1370, 1395, 1404-05; Dept. Ex 13)

Respondent testified that once she exited the bedroom door, Ms. Danner declared, “This is as far as I’m coming out.” Respondent, who was still standing angled by the boxes, allegedly answered, “Please, we’re only here to help you. The EMTs are here. Just come outside with us. We only want to help.” Although he could not remember Ms. Danner’s exact words, Respondent “could tell she wasn’t going to go any further with us.” He continued, “Just doing this all these years, I knew she was going to run back. By the way she was moving, she was going to go back into the room and get those scissors...I really believed she was going to run back and get them.” He explained that the “last thing [he] wanted” was for Ms. Danner to “rearm” herself with the scissors. Claiming he “knew” she was going back into the bedroom, Respondent made a judgment call to “grab” Ms. Danner while she was still in the hallway, noting that the scissors remained on the nightstand inside the bedroom, an estimated ten feet away from her. As the supervisor on scene, he was the person responsible for the safety of “everyone” there and believed this was the “safest” course of action. He added, “[W]e do it all the time.” (Tr. 1355-62, 1371, 1400-01, 1405-06)

Respondent recalled “nodding” at an officer and moving “very quickly” toward Ms. Danner. He believed the other officers would know what to do and follow him. Respondent claimed that from “inches” away, he tried “to grab” Ms. Danner, but she “sprinted...back into the room” and “jumped on the bed, by the crease where you fold the sheets.... That’s when she grabbed the baseball bat and popped up at the edge of the bed.” She was “very quick” as she “kind of like leaped onto the bed and popped up real quick...like [in] a batter’s stance...with a swing.” Respondent, who estimated being three feet away, immediately drew his firearm and said, “Please drop the bat, drop the bat, drop the bat.” He testified that “when she lunged,” he believed she was about to hit him in the head with the bat, causing him to fire two shots. (Tr. 1361-66, 1406-07) Respondent requested EMS over the radio and then called for the EMTs who were outside the apartment to render aid. (Tr. 1366)

Prior to the discharge of his firearm, Respondent told this tribunal that he did not believe ESU intervention was warranted. He explained:

You’re taught to use your words first and that’s exactly what I did. I was just trying to get her to trust me when we were speaking. She put down the scissors. At that point, I have her trust and she came outside. You want to speak first. You don’t want it to escalate to anything else.
(Tr. 1370)

Respondent told this tribunal that he believed, and still believes, that in this particular situation, he took all the time necessary -- “every single second of every single minute that I could”-- to attempt voluntary compliance and agreed that he did “nothing wrong.” When asked if he regretted the shooting, Respondent stated, “I hate that all of this happened but, in the end, I knew what I had to do.” (Tr. 1408, 1417, 1423-24)

All five police officers present on the scene testified about what occurred after Respondent entered apartment 7E. Rosario, who was standing closest to Respondent during

those critical final minutes, testified that he first noticed Respondent standing in the entrance to the living room. He and Perez approached to brief him. Rosario recalled informing Respondent that Ms. Danner had “picked up a scissor. I tried talking to her to see if she [would] talk to EMS...she was saying no...she was screaming and she went into the room. I don’t know if she still has the scissors but she had [them] when she went in. She’s saying, ‘If you come in, I’m going to fight you. I don’t want you guys in my house.’” Although Rosario did not remember whether Respondent asked any questions, he did confirm discussing that they would try to restrain Ms. Danner if the opportunity arose. Respondent did not give specific directions, but did approach the bedroom hallway “to see the situation.” (Tr. 1190-95, 1263-73, 1295)

Rosario recounted that, from the hallway, Respondent addressed Ms. Danner in a clear and normal tone, saying, “Ma’am, please you know we’re here to help you. We’re going to take you to the hospital.” He also remembered Respondent telling her “if you got the scissors, please let it go or drop it.” Although from his position next to Respondent he could not initially see into the bedroom, he could hear Ms. Danner yelling for the officers to leave. (Tr. 1196-98, 1274-78) When they repositioned themselves, he was able to see Ms. Danner sitting on the bed with her head down, still yelling that they should leave. He did not see whether she was holding scissors at this point. (Tr. 1198-1203, 1213, 1286-87)

Rosario clarified that he was positioned “right behind” Respondent and that the other officers “were right there, right next to us.” From this position he could see the left half of Ms. Danner’s body as she sat on her bed. According to Rosario, Respondent moved slowly toward the bedroom and entered “right inside the doorframe.” When they stepped inside the bedroom, he saw Ms. Danner grab a bat from a seated position and then immediately stand up. (Tr. 1203-10, 1213, 1216, 1279, 1281) He stated it would have been difficult for him to back up because

he would have “bumped” into the other officers who were staggered behind him. He further agreed that if Respondent had backed up he would have “bumped” into him. (Tr. 1210-11)

According to Rosario, Ms. Danner held the bat “like she was going to swing like a baseball player.” He clarified, “She move[d] the bat like she was going to swing it . . . I don’t remember if she actually swing [sic] it. You know my angle, I saw that she was moving it.” He testified that when Respondent saw the bat “he pulled out his pistol...straight at her. He told her a few times, ‘Drop the bat. Please, ma’am, drop the bat . . .’ He told her I guess three times and the way she was moving the bat, you know then he fired two shots.” (Tr. 1216-21, 1282-83) Though it was a “quick situation,” Rosario agreed on cross that his observation of Ms. Danner stepping towards Respondent in a batter’s position “looking back and forth” led him to believe she had, as characterized by counsel, “started the process of swinging the bat at Respondent.” (Tr. 1283-84) At some point after the EMTs transported Ms. Danner to the hospital, Rosario noticed the scissors on top of the night table next to the bed. The last time he had actually observed the scissors, they had been in Ms. Danner’s hands. (Tr. 1285-86; *see* Dept. Ex. 14)

When asked his reason for following Respondent into the bedroom, Rosario explained, “Because...either she’s going to comply or we’re going to grab her by the arm...and restrain her.” He acknowledged that “a lot” of EDPs threaten to fight police officers, but “most of the time . . . you make a move for them [and] they do nothing and just comply.” Though the goal of EDP jobs is to have the subject go to the hospital voluntarily, he agreed that officers “go hands on and physically restrain” EDPs on an almost “daily” basis. He believed that the five officers would “figure out” how to restrain Ms. Danner once they entered the bedroom. (Tr. 1211-13, 1222-23, 1279, 1290-92)

Perez testified that when Respondent and his driver arrived, he and Rosario were by the kitchen. They had a view of the bedroom but could not actually see Ms. Danner. Perez did not

recall whether he spoke to Respondent first, but testified that he was able to tell him “everything that we had.” Specifically, Perez informed Respondent that Ms. Danner was aggressive and uncooperative, had threatened to fight and that she was in her bedroom with scissors. Respondent nodded his acknowledgement, but Perez did not remember him asking follow up questions. (Tr. 396-98, 452-55)

After their conversation, Respondent walked towards the bedroom, where Ms. Danner continued yelling and threatening to fight. Perez did not recall him verbalizing any plans, but believed Respondent was going to the bedroom to attempt to gain compliance. Perez did not observe him enter because he was standing by the front door with the EMTs and was facing the exterior hallway. He did not remember exactly where the other officers were positioned, but he knew they were all in the apartment hallway and that they followed Respondent toward the bedroom. He heard Respondent verbally attempt to gain compliance, asking Ms. Danner “How are you doing?” and saying, “We’re here to help, ma’am, calm down,” and Ms. Danner loudly responding, “I don’t want you here. I didn’t call you. I’m going to fight you if you come here.” He then heard a voice that sounded like Respondent say, “Put it down,” twice, in a loud, commanding voice before he heard “drop it, drop it,” followed by two gunshots. Perez testified that he was “surprised” and “afraid” when he heard gunshots. (Tr. 399-408, 456-64)

Perez concurred with Respondent’s tactics. He thought they had sufficient information to make decisions about how to proceed and did not believe calling ESU was warranted. He noted that he had previously witnessed the same de-escalation tactics used successfully with armed EDPs. (Tr. 464-67, 472)

Martin, who arrived with Respondent, recounted that upon entering the apartment, he saw Rosario, Perez, Rabadi and Garces positioned between the pillar, which had boxes in front of it, and the living room entrance. He heard Ms. Danner yelling and saw her sitting at the foot of her

bed. While it appeared that she held something in her hands, he could not discern what it was. Martin, however, heard Rosario tell Respondent that Ms. Danner was holding a pair of scissors. (Tr. 773-78, 820-24)

According to Martin, after Respondent was briefed, he approached the hallway pillar with Officer Rosario. Respondent “calmly” told her, “We’re here to render aid. We’re here to help you. Please put down the scissors. EMS cannot render aid to you if you have a weapon in your hand. Do you want to talk to EMS?” Ms. Danner made it clear she “didn’t want anything to do with the police...wanted us out of there. Screaming, yelling, cursing.” He confirmed that she threatened to fight. Respondent continued to ask her to release the scissors, but Martin was unaware if Respondent persuaded her to comply. (Tr. 779-85, 827-32, 853-55)

Martin testified that he heard the female EMT say, from the threshold of the apartment entrance, “We’re here to render aid. Just put the scissors down and come outside.” According to Martin, although he had his back to the bedroom door, he “heard” “barefooted walking” moving toward him and Ms. Danner assert, “I’m not going any further than this.” He then “heard” footsteps “fading away from [his] position.” Martin claimed he did not turn around to see what was happening. However, when he “saw” the movement of Rosario and Respondent toward the entrance of the bedroom” he “proceed[ed] ... to go....” The officers then “staggered in that corridor.” (Tr. 787-88, 834-36) Though Respondent gave no verbal directives, Martin understood that, “We were going to apprehend Ms. Danner...to take her to get the treatment that she needed.” (Tr. 785-94, 792-92, 837-38, 851)

Martin recalled that when they got to the threshold of the bedroom, the officers stopped, but he did not know why. When he leaned toward his right side to see around Rabadi, he observed Ms. Danner sitting in the middle of the bed holding up a “brown cylindrical object,” which he later learned was a baseball bat. Martin then returned “back to [his] location behind

Officer Rosario.” Respondent said, “Put it down, put it down, put it down” as he stood with his firearm in a shooting stance. Martin estimated Respondent was about 3 to 4 feet from Ms. Danner. He testified that Respondent could not retreat “in this vicinity because his back was towards the hinges of the door. He was past that threshold.” He next heard two gunshots and then heard Respondent transmit, “shots fired, female likely,” which he understood to mean “likely to pass away.” (Tr. 795-803, 838-40)

Rabadi testified, consistent with other officers, that upon arrival, Respondent was calm and “took control of the scene.” Rabadi recounted that Respondent “took a couple of steps forward closer to her bedroom” and had a “normal conversation to get her to calm down” and drop the scissors. He remembered Respondent telling Ms. Danner they were there to help and that someone had called 911 because they were worried about her. Rabadi stated that Respondent did not enter the bedroom and was “in the threshold” with Rosario behind him. Martin and Rabadi stood behind Rosario. Rabadi was able to see Ms. Danner sitting at the foot of the bed holding the scissors “handle down, blades pointed up.” She still seemed upset, but was “calming down a little more,” though she continued “saying the same things,” reiterating that she had not called the police and they should “get the fuck out.” Rabadi was unsure if Ms. Danner threatened to fight the officers when Respondent was present. (Tr. 507-14, 549-55)

The conversation between Respondent and Ms. Danner went on for about a minute when Rabadi heard a thud that “sounded like she threw something on the floor.” He assumed it was the scissors, though he was unable to actually see. He explained that, at that point, Ms. Danner, “was out of my sight. I couldn’t see to the left of the room because of the way the door was.” He estimated that a “couple of minutes later,” he heard Respondent say, “Drop it, drop it, drop it,” in a demanding, assertive voice and observed Respondent from behind appearing to take a firing stance. Then he heard gunshots. (Tr. 513-17, 555, 558, 560-61)

He had not received any instructions from Respondent prior to this happening and remained standing in the same spot by the pillar the entire time. He described the officers “in that little narrow hallway” as “stacked behind each other, there [wa]sn’t much room for any of us to go.” He did not observe a baseball bat. When asked if Respondent was standing “in the bedroom,” Rabadi stated, “No, he was in [the] threshold by the door by the bedroom. Rosario was right behind him.” (Tr. 516-18, 559)

Rabadi stated that the de-escalation tactics Respondent had tried to employ were consistent with NYPD training. He never considered suggesting that Respondent call ESU as he felt the situation was under control up until he heard the shots fired. When asked if he believed Respondent’s actions were appropriate, with the benefit of hindsight and all the information about the bat, he stated “Me knowing now that it was a baseball bat, [that] was what we did every time we went to the range.” (Tr. 562-63, 567-72)

Garces testified that he remained near the apartment entrance, but kept his eyes fixed on the bedroom for everyone’s safety. He continued to pay attention to the bedroom as Respondent arrived and spoke with one of the other officers. Respondent, who Garces knew to be a very competent and very knowledgeable supervisor, did not give any instructions. It did not appear to Garces that Respondent was in a rush. (Tr. 875, 882, 885, 908-10)

Garces recalled Respondent “proceed[ing] to try to speak with Ms. Danner and comfort her,” but she continued yelling. He did not recall whether Ms. Danner still held scissors in her hands when Respondent arrived and did not know if she put them down at any point. He remembered Respondent, standing near the boxes, stating in a tone that was “calm” but “loud enough for Ms. Danner to hear,” that the officers and EMS just wanted to help her. Ms. Danner loudly responded, “Get the fuck out, I didn’t call you.” They went back and forth a few times until “eventually there was fast movement toward the bedroom, Sergeant Barry and the rest of us

proceeded towards the bedroom in a fast manner...Barry was asking her to put it down and she was still yelling..." He was not aware if Ms. Danner had changed locations within the bedroom or whether she walked towards the door. (Tr. 884-90, 911-15)

Garces did not know what caused the sudden shift toward the bedroom; he specified however, that Respondent did not run inside. Respondent was in front of the bedroom door asking Ms. Danner to put an object down. Garces stated he followed behind Respondent because "I'm there to back the unit...we all move together." He remembered Respondent and Rosario being toward the front next to one another with himself, Martin and Rabadi behind, though he did not remember the order. His view of the bedroom was obstructed at this point; he saw Respondent's shoulder near the doorframe but was uncertain if his foot was beyond the base of the bedroom door. He heard Respondent command Ms. Danner to "drop it" four times, and assumed Respondent was referring to the scissors. It was then that he heard two gunshots followed by Respondent calling for EMS. (Tr. 890-99, 915-19)

Analysis of Evidence Concerning Tactical Decisions

The uniformed members of service who testified at trial were, at times, imprecise and vague in their recounting of details concerning Respondent's actions. Accordingly, the resolution of much of this case turns primarily on an assessment of credibility and the painstaking reconstruction of what likely occurred. The law creates the framework within which to make these determinations, and sets forth rules for the scope and manner in which conflicting accounts may be received and considered, allocating to one side or the other the burden of proof and establishing the degree of certitude with which a fact finder must be convinced before rendering a decision. In making credibility assessments, the tribunal considers a wide range of factors, including but not limited to, witness demeanor, corroborating evidence, the consistency of witness accounts both at trial and over time, the degree to which a witness is interested in the

outcome of a case, the potential prejudice or bias of the witness, and whether an account is logical and comports with common sense and general human experience. The ultimate decision of which accounts to accept, however, remains the exclusive province of the fact finder.

As set forth in detail above, portions of the officer accounts were equivocal or differed on issues such as their exact positions in the hallway and the specific words Ms. Danner and Respondent exchanged. In addition, some officers had only a partial view of Ms. Danner as she sat in her bedroom. In totality, however, their testimony corroborated significant portions of Respondent's account. Specifically, this tribunal finds that the preponderance of the credible testimony presented at trial established that: upon arrival Respondent was informed that Ms. Danner was noncompliant, violent and armed with scissors; Respondent was calm and took the lead at the scene; he initially stood at a distance from the bedroom door in the cramped and crowded hallway of 7E with the other officers close by; Respondent spoke to Ms. Danner in a calm and professional tone while standing at a distance; and, Respondent attempted, over the course of an estimated three to four minutes, to use verbal de-escalation techniques to persuade Ms. Danner to voluntarily drop the scissors and go to the hospital with the EMTs.

Respondent, however, also asserted that as he talked to Ms. Danner he "got her to put [the scissors] down," gained "her trust" and persuaded her to come "just right outside the doorway of her bedroom." Respondent told this tribunal that as Ms. Danner stood in that hallway, an estimated 10 feet away from the scissors, he decided to restrain her and "bring her to the EMTs." (Tr. 1350, 1359, 1361, 1370-71) He explained:

Because, at that point, she had put the scissors down... [S]he put them on the nightstand, and ... at that point, I knew that she was going back into the room, and run and get those scissors. That's the last thing I wanted. That's when ... I made the judgment call, and I knew I had to go and grab her. I felt that was the safest ... being the supervisor there, you're responsible for everybody there: the cops, the civilians, EMTs, you know everybody, Ms. Danner herself. That's what I felt was the best thing to do; was to go and grab her, and we do it all the time. (Tr. 1371)

In sum, Respondent testified that he only attempted to restrain Ms. Danner after he convinced her to relinquish her weapon; she was no longer armed and the weapon she had held was ten feet away and no longer within easy reach.

Several key factors convinced this tribunal that these aspects of Respondent's narrative were gross distortions of the truth. First and foremost is the troubling fact that not one of the five uniformed members of service at the scene corroborated Respondent's testimony that he convinced Ms. Danner to voluntarily abandon the scissors. For example, Respondent testified that in an effort "to bargain with her" he offered to "take a few steps back." Specifically, he related that it was "kind of like an exchange, if I move back a bit, can you put down the scissors and come out?" (Tr. 1349-50, 1353) According to Respondent, Ms. Danner's response to that offer was to voluntarily slam the scissors down and walk away from them.

Although all the officers there concur that Respondent attempted to persuade Ms. Danner to put down the scissors and speak to the EMTs, no one confirmed that Respondent offered to step back and that this purported "bargain" sparked Ms. Danner's acquiescence to disarm. Although it would be unreasonable to expect each officer to recall the exact words used by Respondent and Ms. Danner, it is odd that, despite testifying rather specifically to other details about that exchange, none of the officers recalled the unique strategy that allegedly earned Ms. Danner's "trust" and edged her closer to voluntary compliance. In sum, the idea that Respondent convinced Ms. Danner to abandon the scissors as a weapon was not supported by the credible evidence presented by the other witnesses. On the contrary, Ms. Danner remained violent as she continued to either hold the scissors or place them within easy reach. As Rosario, who stood closest to Respondent, confirmed, he did not see Ms. Danner put the scissors down or hear "anything that sounded like the scissors being put down or dropped." (Tr. 1220, 1247, 1278-79)

Second, none of the police officers present at the time confirmed that, after Respondent allegedly convinced Ms. Danner to put down the scissors, she stood up from a seated position on her bed, exited her bedroom and stood unarmed in the hallway.⁴ It is important to note that the officers were standing in a hallway measuring approximately 3' 7" in width and, at most, 10' 8" in length. (Dept. Ex. 9) A careful examination of the Faro Scan Disk and Screen Shot (Dept. Exs. 12, 13), as well as the hallway photographs (Resp. Exs. A3-5, A8), reveals how improbable it would be for Ms. Danner to have been standing in that small area without at least some of the officers noticing her presence.

It is important to underscore that these officers were at the scene of a violent EDP who was holding a potential weapon in her hands. Under these conditions, the attention of the responding officers would likely be on their patrol supervisor's interaction with that EDP.⁵ This is verified by each officer's testimony concerning the verbal exchange between Respondent and Ms. Danner. Garces convincingly explained that he kept his "eyes fixed" on the bedroom "for everyone's safety." Despite the officers' vigilance, their accounts did not corroborate her purported exit from the bedroom.

Furthermore, the officers concurred that they followed Respondent through that short span of space with the ultimate intention of restraining Ms. Danner. It is only logical that as they did so, they would have been trying to track her movements. Even accepting the reasonable assertion that they were eventually "staggered" with obstructed views of the bedroom, it is highly unlikely that, as Respondent talked to Ms. Danner from three feet away, all of the officers would have missed her standing up, walking toward the door and standing in the hallway, just

⁴ Although the testimony also established that there were boxes stacked by the hallway pillar (Resp. Ex. A3), their estimated height of three feet was unlikely to have entirely obstructed the view of an adult standing in the hallway. (Tr. 823)

⁵ Two officers claimed that they were positioned with their backs facing the bedroom door at this key juncture. Officer Perez testified that he was facing the apartment entrance. (Tr. 402) Officer Martin claimed that he was in the hallway leading to the bedroom but testified that he was facing the apartment entrance and not the bedroom door. (Tr. 786)

prior to the officers moving in. Such a finding would not comport with common sense, logic and sound police practices.

Most telling, however, was the testimony offered by Rosario -- the officer who stood closest to Respondent during those critical moments. Rosario told this tribunal, that despite being “right behind” Respondent in that small hallway, he did not remember Ms. Danner putting down the scissors and exiting the bedroom immediately before Respondent moved in to restrain her. Instead, he credibly recounted a starkly different scenario. Specifically, he stated that Respondent “walk[ed] slowly” toward the bedroom. When they got to the pillar, Rosario described Ms. Danner as sitting on the bed, with her head down, yelling for them to leave and threatening to fight if they entered the bedroom. Although he did not know whether she was still holding the scissors, he believed Respondent was still trying to “convince her to go the hospital.” When Respondent stepped inside the bedroom, Rosario saw Ms. Danner “still sitting on the bed.” When specifically asked whether Ms. Danner came out of her bedroom as Respondent talked to her, he responded, “I don’t remember. I don’t think so.” When asked if “Ms. Danner came out of her bedroom while speaking to Respondent and put the scissors down before she did that,” he looked quizzically, shook his head no and stated, “I don’t remember that.” (Tr. 1196-97, 1213, 1215, 1274-78, 1286-87)

Rabadi’s account also undermines Respondent’s assertion that Ms. Danner left her bedroom moments before the shooting. He testified that Respondent was “standing at the threshold” with Rosario behind him and Martin and Rabadi behind Rosario. He was able to see Ms. Danner sitting at the foot of the bed holding the scissors and reiterating that she had not called the police and they should “get the fuck out.” (Tr. 510-13, 549-55) From the doorway, Respondent spoke to her about putting down the scissors. The exchange between Respondent and Ms. Danner went on for about a minute before Rabadi heard a thud that “sounded like” she

had thrown “something” on the floor. Rabadi assumed it was the scissors, though he was unable to actually see at that point. He subsequently heard Respondent say, “Drop it, drop it, drop it” and then gunshots. He did not place Ms. Danner in the hallway and did not observe her running back into the bedroom. (Tr. 514-16, 555-58)

Garces testified that he was also in the hallway as Respondent stood by the pillar speaking to Ms. Danner and that he kept his eyes fixed on the bedroom for everyone’s safety. He recounted that Respondent continued his “back and forth” with Ms. Danner until “eventually there was fast movement toward the bedroom.” According to Garces, Respondent stood “in front” of the bedroom door as he asked her “to put it down” and she yelled “don’t come in.” (Tr. 890-91) Despite his proximity in this small space, Garces did not know what had caused the sudden shift toward the bedroom. (Tr. 891) Again, Ms. Danner’s alleged exit from the bedroom was undetected. (Tr. 914-15)

At first blush, the closest a police officer came to partially corroborating this point was Respondent’s driver. Martin testified that as Respondent spoke to Ms. Danner from the hallway, he stood near the pillar “facing the entrance to the apartment.” From that position, he allegedly “hear[d] footsteps as if they were getting louder toward my direction.” The footsteps, he detailed, “sounded like … barefooted walking on wooden floors.” He then heard Ms. Danner say, “I’m not going any further than this,” and then the “footsteps getting fast paced and running back into the bedroom.” That is when they all moved in to apprehend Ms. Danner. (Tr. 786-789)

The reliability of Martin’s account, however, is highly questionable. As he explained, his back was to the bedroom entrance and he did not “see her movements.” In fact, he admitted to not knowing Ms. Danner’s actual location and could not even state whether she was alone in the bedroom. The vagueness of his testimony decreases the probative value of Martin’s tortured description of footprint “sounds.” More troubling, however, is Martin’s claim that, even though

he allegedly “heard” Ms. Danner coming toward him, he did not turn around to ascertain what was happening. Martin would have this tribunal believe the unlikely scenario that when he “heard” a violent, potentially armed EDP walking toward him, he did not even glance in the direction of the potential threat and instead chose to keep his back toward her. The account is even more improbable given Martin’s assertion that, immediately thereafter, he was able to “see the movement of Rosario and Respondent toward the entrance of the bedroom” and follow.⁶ (Tr. 786-88, 791)

In sum, Respondent’s carefully constructed departure from the truth on two critical issues was impossible to reconcile with the testimony of the other uniformed members of service present. Accordingly, it fell apart under the weight of the credible evidence. Respondent has an obvious interest in the outcome of this disciplinary hearing and a strong motive to present a version of events which justify his actions. Moreover, his unabashed obstinacy on cross-examination raised serious questions about his character, credibility and judgment.

The preponderance of the credible evidence has led this tribunal to conclude that the most critical portions of Respondent’s account were embellished with self-serving and fabricated details directed at minimizing his culpability. Accordingly, the record established, by a preponderance of the credible evidence, that Respondent pierced a zone of safety to move in and restrain an uncooperative, violent EDP who either held the scissors or had one within easy reach

⁶ It is uncontested that, at this point, Perez was standing by the apartment door facing the common hallway and did not see inside 7E.

when she was isolated and contained in her bedroom and posed no immediate threat of harm.⁷

Analysis of Patrol Guide Rules and Training

As this tribunal has noted in past decisions, there is an inherent tendency to look back and find fault with decisions, particularly when police actions have tragic results. Determining whether a respondent's conduct was improper cannot be done through the lens of hindsight. It is well-settled law that police officers must frequently make split-second judgments under circumstances that are tense, uncertain, and rapidly evolving. Accordingly, the trier of fact must assess whether the conduct at issue was reasonable under the circumstances as they unfolded at the time.

Preliminarily, I note that many of Respondent's initial decisions, with which the Department Advocate took issue, were not unreasonable. For example, Respondent acted appropriately under the circumstances by proceeding directly to the apartment without first

⁷ In making these findings, this tribunal acknowledges that accounts describing where the EMTs were positioned, the timing of their interaction with Ms. Danner, and what role they played in seeking compliance, were contradictory and inconclusive. Assessment of these accounts was further complicated by the fact that EMT Mullings did not appear at this trial; thus, this tribunal was left with only her hearsay statement to review. EMT Moore was, by his own account, in and out of 7E during the incident. Moreover, this was a distressing event for the EMTs. That under these circumstances they were asked to relate what occurred during five minutes of a job they responded to years ago, likely impacted their accuracy.

Indeed, their accounts were irreconcilable in some respects. For example, in the hearsay statement entered into evidence, EMT Mullings asserted that, prior to Respondent's arrival, she entered 7E and spoke to Ms. Danner only after the officers had convinced her to put down the scissors and exit the bedroom. (Dept. Ex. 21 at 285, 313-16, 337-38) In contrast, EMT Moore testified that he and Mullings made the calculated risk of entering 7E when Ms. Danner was still holding scissors and that it was Mullings, and not the police officers, who convinced Ms. Danner to put down the scissors. (Tr. 609, 611, 632-33) Even where their recollections were consistent, this tribunal found the accounts to be of limited probative value. For example, both EMTs assert that Respondent entered 7E after Ms. Danner was unarmed. According to their statements, Respondent spoke briefly to the officers and, in as little as 30 seconds, said "Ready?" and rushed into the bedroom without first attempting to gain voluntary compliance. Notably, Mullings is also the only person there, other than Respondent, who placed Ms. Danner outside the bedroom while Respondent was inside 7E. These details are notable for their stark contrast to the testimony provided by the officers at the scene. (Tr. 644; Dept. Ex. 21 at 325)

For the following reasons, this tribunal cannot fully credit the reliability of their factual accounts. First, Ms. Mullings did not testify at trial. Although the hearsay statement in evidence is a criminal court transcript, this tribunal had no opportunity to assess her demeanor nor assess how her account would have held up under the scrutiny of cross-examination. Moreover, there were parts of her statement that are difficult to reconcile with uncontested facts. For example, Mullings recalled that before entering 7E, she saw Jennifer Danner in the hallway speaking to Moore and heard her say she would not enter that apartment. Although it is uncontested that Jennifer Danner and Respondent arrived at the scene together, Mullings affirmed that, it was only after witnessing that exchange that she entered 7E and saw Respondent arrive. Rosario also testified that Ms. Danner stepped into the hallway and that Mullings did come in, but asserted that Ms. Danner was in her bedroom, and Mullings had already stepped out, by the time Respondent entered. This leads this tribunal to believe that the sequence of events as Mullings recalled them were likely jumbled. (Tr. 1182-89, 1242-47; Dept. Ex. 21 at 313-16)

This tribunal reached a similar conclusion with respect to EMT Moore. Although his trial testimony was earnest and forthright, he readily admitted to being somewhat unsure about the reliability of his memory. He explained, "I don't know if my memory is good or reliable. Honestly, I've done everything in my power to not remember this . . ." (Tr. 717) Part of his accounting of those critical minutes was also imprecise and sometimes undercut by the evidence -- for example, he testified that he spoke to Jennifer Danner in advance of Respondent's arrival. Security camera footage, however, clearly shows that Respondent and Jennifer Danner arrived on the seventh floor at the same time. Ultimately, the EMT accounts raised more questions than they answered and, as such, were of very limited probative value.

identifying the 911 caller or seeking additional information from the civilians or EMTs on the scene. Respondent's explanation that, as patrol supervisor, his first priority was to find his officers to assess the situation and be briefed as to their preliminary investigation, was wholly rational. As Respondent had deduced from Jennifer Danner that the EDP had a history of barricading herself and he became concerned about scene safety when he saw the EMTs waiting in the hallway instead of rendering aid. While gathering additional information might have been helpful, the circumstances do not support a finding that it was misconduct for Respondent not to do so before assessing the safety of his subordinates and determining what information had already been gathered by his officers.

I further find that his decision to engage Ms. Danner from a distance in the hallway when she was in her bedroom, and attempt to verbally obtain her voluntary compliance, was unassailably consistent with Department de-escalation training. That the ideal zone of safety of twenty feet could not be maintained, inside a New York City apartment, does not amount to misconduct. As the Patrol Guide explains, the "zone of safety varies with each situation." Also of note is that the failure to establish firearm control was not an issue here because none of Respondent's subordinates used, attempted to use, or even unholstered their firearms.

In contrast, Respondent exercised extremely poor tactical judgement when he escalated the level of this encounter by leading the officers into Ms. Danner's bedroom and approaching her while she was either armed, or while her weapon was within easy reach. By rushing into Ms. Danner's bedroom, this patrol supervisor not only employed poor tactics, he proceeded in direct contravention of the Patrol Guide and his training. As a result, within five minutes at the scene, he took the significant and unreasonable risk of instigating an unsafe encounter rather than preventing it. In short, Respondent unnecessarily discarded the zone of safety for an armed

EDP, thereby exposing himself and others to preventable physical danger which resulted in Ms. Danner's death.⁸

Patrol Guide Section 221-13⁹, as well as the Police Academy training on "Policing the Emotionally Disturbed," which Respondent attended as a new officer and which echoed the Patrol Guide verbatim on these points, outlines how all uniformed members of service are to proceed when confronted with various EDP scenarios:

- A. If EDP's actions constitute immediate threat of serious physical injury or death to herself or others: take reasonable measures to terminate or prevent such behavior. Deadly physical force will only be used to as a last resort to protect life.
- B. If EDP is unarmed, not violent and willing to leave voluntarily: EDP may be taken into custody without the specific direction of a supervisor.
- C. In all other cases, if EDP's actions do not constitute immediate threat of serious physical injury or death to herself or others: attempt to isolate and contain while maintaining a zone of safety until arrival of patrol supervisor and ESU personnel. Do not attempt to take into custody without specific direction of a supervisor.
(See Dept. Exs. 18, 20)

The first two scenarios are clearly inapplicable. Ms. Danner had been isolated and contained in her bedroom for several minutes. While a weapon was either in her hands or within reach, she was at a relatively safe distance from the officers and did not threaten to harm herself. Moreover, no "immediate threat of serious physical injury" was described by the witnesses. As to the second scenario, Ms. Danner was, by all accounts, armed, combative and unwilling to leave voluntarily.

As such, this incident falls under category C -- where continued containment is required until the arrival of a "patrol supervisor *and* ESU personnel." Respondent, of course, was the

⁸ Even if this tribunal accepts the narrative that Ms. Danner put the scissors on the nightstand before Respondent entered the room, she would still be considered an armed EDP because the weapon continued to be within easy reach. (See Dept. Exs. 9 & 10)

⁹ At the time of Respondent's training, the relevant Patrol Guide section was P.G. 216-05. On June 1, 2016, segments of the Patrol Guide were reorganized and the EDP procedure was "transferred" from P.G. 216-06 and "placed" into the new Patrol Guide Tactical Operations Series as P.G. 221-13. The content remained the same. (Tr. 1017-18; Dept. Ex. 20; see Interim Order - Creation of Patrol Guide 221 Series [May 31, 2016])

patrol supervisor whose arrival the Patrol Guide speaks to. Being the patrol supervisor on the scene, however, did not release him from the obligation of awaiting the “arrival of ESU personnel.” Respondent ignored his responsibility and instead chose to literally take the situation into his own hands by attempting to grab a contained, violent and armed EDP.¹⁰

A *Note* on page 3 of Patrol Guide Section 221-13 contains an even more explicit directive. The *Note* lays out a clear and bright-line rule for dealing with an “EDP [who] is contained and is believed to be armed or violent, but due to containment poses no immediate threat to any person.” This is the exact scenario Respondent encountered when he walked into 7E. Respondent himself testified that Ms. Danner was isolated and contained while she was in her bedroom and that the officers were in a zone of safety in the hallway by the pillar and boxes. (Tr. 1341-42) Rosario concurred with that assessment, adding that Ms. Danner holding the scissors required that they be “careful” and adjust positions for “distance... just in case she tried to charge...” (Tr. 1249-50, 1256) Perez made similar observations. (Tr. 390-91)

In that situation, the Patrol Guide explicitly directs that, “no additional action will be taken without the authorization of the commanding officer or duty captain at the scene.” Respondent’s actions constitute a clear-cut violation of what the Patrol Guide required in this situation. Instead of adhering to protocols, within five minutes of arrival, Respondent crossed the line by unilaterally choosing to physically engage Ms. Danner and not seek the assistance of those with expertise and specialized equipment.

¹⁰ In making this finding I acknowledge that ESU can only respond to a small percentage of the estimated 150,000 to 200,000 EDP calls it receives every year. As such, patrol officers and supervisors appropriately handle the overwhelming majority of these calls and successfully connect EDPs to mental health professionals. The findings above do not, and should not, discourage officers from verbally engaging EDPs to encourage voluntary compliance, or restrain EDPs when warranted or necessary. This specific case, however, involved a volatile and involuntary EDP with a known history of ESU interventions. More importantly, this job involved a contained EDP known to be in possession of a weapon under inherently volatile circumstances. For this reason, the Patrol Guide and training acknowledge that physically engaging an armed EDP “requires a high degree of skill and sensitivity,” as well as the expertise and specialized equipment provided by ESU, commanding officers or duty captains. These directives cannot be ignored.

This was a remarkably impulsive decision, particularly since Respondent admitted knowledge of prior ESU interventions. His rush to force a physical confrontation, instead of calling and waiting for ESU or his supervisors as the officers maintained their zone of safety, was unnecessarily dangerous and tactically unjustified. Respondent's rationale that he "knew" Ms. Danner was not going to comply voluntarily, is woefully insufficient to override Department policy concerning an armed EDP.¹¹ In fact, the Patrol Guide specifies that it is the job of the *ESU supervisor* to "devise plans and tactics to deal with" exactly these types of crises. Respondent, having usurped that role, needlessly ignored the complexities of that task.

Respondent's recruit training lesson also contained a scenario where an EDP was making threatening gestures with a knife. Officers are taught that approaching the EDP, rather than isolating and containing the EDP inside the apartment, might lead to the EDP advancing with the weapon, constituting an "imminent threat" and putting "the officer in a position where he is forced to shoot." The training explains that the shooting "would not have been necessary had the officer followed Department guidelines." (Dept. Ex. 18 at 20) Again, this closely approximates the exact scenario Respondent encountered and his actions fall directly under what new recruits are trained is an "improper" handling of an EDP job.

The tragic outcome of this case is the very result the Patrol Guide aims to avoid by directing the patrol supervisor to wait when an armed EDP is volatile, but contained, and let the decision-making fall to ESU or a high-ranking supervisor. Respondent's unwarranted decision to advance toward Deborah Danner when she was armed and contained in a bedroom put him,

¹¹ This tribunal carefully reviewed and considered the testimony of retired Chief Joanne Jaffe, who expressed her belief that the Department's EDP procedure at the time was "confusing and inconsistent." She also detailed her participation in a 2017 Department-wide EDP Working Group tasked with reviewing those procedures. (Tr. 1463-64, 1470, 1475) While this tribunal deeply respects Chief Jaffe's decades of experience and her insights, she did not speak to what was confusing and inconsistent regarding the provisions involving the specific scenario in this case: a contained, armed and violent EDP. Further, her testimony did not impact the tribunal's view that the Patrol Guide is clear and unambiguous that in a situation with an "EDP [who] is contained and is believed to be armed or violent but due to containment poses no immediate threat of danger to any person," "no additional action will be taken without the authorization of the commanding officer or duty captain at the scene." It is of note that this Patrol Guide provision was not subsequently amended. Moreover, Respondent at no time expressed that he was confused or unclear regarding his training; conversely, he was resolute that he and the officers on the scene "knew" exactly what to do.

just as his NYPD training warned, in a position where he was ultimately forced to make a split-second decision to protect himself. Had he followed the clear guidelines, and taken no further action without authorization from a high-ranking supervisor, or waited for ESU, it is less likely that he would have put himself in a situation that, not surprisingly, evolved in such a rapid, chaotic and dangerous manner, ultimately ending Ms. Danner's life. As such, this tribunal finds that Respondent did "exercise poor tactical judgment leading to the discharge of his firearm, and did discharge his firearm towards Deborah Danner, resulting in [her] death." Accordingly Respondent is guilty of Specification 1.

Specification 2:
Failure to Supervise

Specification 2 charges Respondent with failing to properly supervise his subordinates at the scene of this EDP incident. Prior cases before this tribunal involving this type of misconduct have typically focused on a supervisor failing to intervene where a subordinate was doing something improper or failing to take an active role in monitoring his officers. Having carefully reviewed the record, with special attention to the testimony of all the officers, I do not find they were improperly supervised. Rather, the officers acted properly and consistent with their training at all points. Respondent's decision to accelerate the situation by moving into the bedroom and attempting to go "hands on," was a tactical failing by Respondent and by Respondent alone. That misconduct was addressed in Specification 1. The fact that the officers moved behind their patrol supervisor, as he used improper tactics, does not amount to improper supervision. While the tribunal was troubled by the flippant and dismissive way Respondent replied to questions about what instructions he gave to his subordinates, his demeanor on the stand does not equate to supervisory misconduct during the incident. For these reasons, the

tribunal finds that the evidence did not establish that Respondent improperly failed to supervise his subordinate officers at the scene. Accordingly, Respondent is not guilty of Specification 2.

PENALTY

In order to determine an appropriate penalty, this tribunal, guided by the Department's Disciplinary System Penalty Guidelines ("Disciplinary Guidelines"), considered all relevant facts and circumstances, including any aggravating and mitigating factors established in the record. Respondent's employment history also was examined (*See* 38 RCNY § 15-07). Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum. The Department has recommended that Respondent, who was appointed to the Department on July 8, 2008, be terminated based on his conduct during this incident. The tribunal concurs with that recommendation.

Members of service are entrusted with substantial power and authority; this is all the more true of patrol supervisors. Intrinsic to their duty is the expectation that they will exercise reasonable judgment in even the most highly stressful and difficult situations. Sound, prudent, decision-making is particularly critical when dealing with an individual experiencing a mental health crisis. It should be noted that this encounter did not involve a violent perpetrator where force was necessary to take an offender into custody pursuant to a legitimate law enforcement action. Rather, this was an interaction involving a mentally ill senior citizen in the throes of yet another psychiatric episode where forbearance was vital to ensure the patient was transported safely to a hospital facility for appropriate medical treatment. It is thus imperative for our patrol supervisors to recognize the stark differences between these two scenarios and more importantly, to deploy correctly the right procedures consistent with each situation.

For these reasons, the Patrol Guide lays out specific guidelines and procedures for the handling of EDP jobs. The cornerstone of this specialized approach can be summarized in one

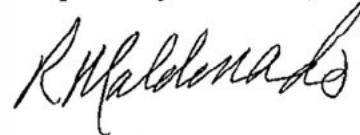
phrase excerpted from the NYPD EDP training curriculum -- “distance and time equals safety.” This mandate for patience protects both the officers and the person in need of assistance.

The preponderance of the credible evidence here has borne out that Respondent completely discarded this central, potentially life-saving tenet. In this situation, Deborah Danner was a sixty-six year old woman with a psychiatric history who was desperately in need of assistance. Still, she was at all times during this volatile encounter, combative and either armed or with a weapon within easy reach. This tribunal is mindful of the dangers presented by this volatile situation. In fact, it is Respondent’s flagrant dismissal of these particularized dangers that was his primary tactical error. As laid out above, Respondent was not without the option of taking more time and awaiting ESU; yet he decided instead to force a confrontation with an *armed and violent but isolated and contained* EDP within five minutes of his arrival on the scene. Respondent’s acceleration of the situation, in contravention to EDP policy and training, agitated Ms. Danner and is indefensible under the circumstances established in the record. In doing so, Respondent set in motion a cascade of events over the next several seconds that ultimately led to Ms. Danner’s death. While the shooting itself was found to be within Department guidelines and is not at issue here, as noted in prior cases, the tribunal “cannot overlook the fatal consequences of an officer’s reckless disregard of Department procedure.” *See Disciplinary Case No. 2018-19274* (Aug. 18, 2019), citing *Disciplinary Case No. 2012-7616* (March 28, 2017); *see also Disciplinary Case No. 2007-82789* (March 23, 2012) (acknowledging an officer’s argument that he made a split-second, “life-or-death” decision, but finding that the exigency was of his own making and that his highly questionable tactical actions in the moments before the shooting led to “horrific results,” making it “clear that [he] lacks the judgment to serve as a police officer.”)

While this case is unique in that it involves an emotionally disturbed person and the specific policies related to EDP calls, it ultimately leads the tribunal to the same result as the cases cited above -- a recommendation of dismissal from the Department. Respondent chose to ignore a specific mandate set forth in Department procedures and instead exercised appallingly poor tactics which endangered him and others at the scene, particularly Ms. Danner, who did not survive Respondent's rash decision to restrain her. Our mentally ill citizens deserve much more from a patrol supervisor.

Furthermore, this tribunal was deeply troubled by much of Respondent's trial testimony during cross-examination. His lack of insight, over five years later, concerning the grave errors he committed, and the direct role he played in precipitating a tragic fatality, is, quite simply, galling. His arrogant assertion that, "I knew what I had to do" was especially shocking because he did exactly the opposite of what was required of him when responding to an armed and isolated EDP. Having carefully considered the testimony, evidence and arguments presented at trial, it is abundantly clear that Respondent's continued employment as a uniformed member of the Department is untenable. Accordingly, it is recommended that Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

DISAPPROVED



SEP 30 2023
EDWARD A. CABAN
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: SUMMARY OF EMPLOYMENT RECORD
SERGEANT HUGH BARRY
TAX REGISTRY NO. 946768
DISCIPLINARY CASE NO. 2017-17490

Respondent was appointed to the Department on July 8, 2008. On his three most recent annual performance evaluations, he twice received 5.0 overall ratings of "Extremely Competent" for 2020 and 2021, and received a 4.5 rating of "Extremely Competent/Highly Competent" for 2019. He has been awarded five medals for Excellent Police Duty.

Respondent has no disciplinary record. In connection with the instant case, he was immediately placed on modified assignment on October 18, 2016 and remained modified until he was arrested and suspended without pay on May 31, 2017. Respondent was thereafter suspended with pay on July 2, 2017. He was returned to modified assignment on February 23, 2018 and remains modified to date.

For your consideration.

Rosemarie Maldonado
Deputy Commissioner Trials